77-510

In the Supreme Court of the United States

OCTOBER TERM, 1977

UNITED STATES OF AMERICA, PETITIONER
V.
STATE OF NEW MEXICO

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW MEXICO

BRIEF AMICUS CURIAE OF PHELPS DODGE CORPORATION

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STATEMENT OF INTEREST OF AMICUS CURIAE

Phelps Dodge Corporation is vitally interested in the outcome of this proceeding and joins with the State of New Mexico in urging the Court to affirm the decision of the New Mexico Supreme Court under consideration in this proceeding.

Phelps Dodge Corporation has for over fifty years owned a large group of patented lode mining claims situate in Grant County, New Mexico, some eleven miles from Silver City, New Mexico. These mining claims were operated as an underground mining operation prior to 1921 but due to the depressed copper market at that time, the operation ceased. In the late 1950's and early 1960's, Phelps Dodge Corporation decided to reopen the mining operation and develop an open pit mine. Incident to the development of the open pit mine, it was determined that it would be necessary to construct a concentrator to process the ore mined prior to shipping the ore for smelting. In order to operate a concentrator of sufficient capacity to process the ore, it was necessary for Phelps Dodge Corporation to acquire, by purchase, a substantial amount of water rights in the Gila water shed. Between the years 1960 and 1973 Pacific Western Land Company, a wholly owned subsidiary of Phelps Dodge Corporation, acquired by purchase water rights allowing them to divert from the Gila Stream System in Grant County, New Mexico, 11,756.281 acre feet of water per year for industrial purposes resulting in an annual consumptive use of 6,562.28 acre feet.

The water rights acquired by Phelps Dodge Corporation were originally acquired by their predecessors in interest as irrigation rights on the Gila stream system under the surface and underground water rights code of the State of New Mexico. The priority dates, as established by the doctrine of prior appropriation, of the water rights acquired by Phelps Dodge Corporation for use in its operations range from a priority date of 1882 to 1962. The method by which these water rights were acquired was either a purchase of the farm to which they were appurtenant or a purchase of the water right without purchasing the land. Thereafter Phelps Dodge Corporation obtained permission from the New Mexico State Engineer, under the appropriate statutes, to change the point of diversion, place and purpose of use. Phelps Dodge Corporation paid approximately $2,500,000.00 for the necessary water rights to service their concentrator.

In order to utilize the water rights and provide water for the concentrator, Phelps Dodge Corporation constructed a diversion dam in the Gila River, whereby water is diverted to a pumping station from which it is pumped to a storage lake of an area of 62.7 surface acres, named Bill Evans Lake. Thereafter the water is pumped through a twenty-two (22) mile pipeline to the concentrator where it is used in the process.

The concentrator, diversion dam, lake, and pipeline were constructed in 1967 through 1969 at a cost to Phelps Dodge Corporation of approximately $140,000,000.00.

The lake was transferred by Phelps Dodge Corporation to the New Mexico Game and Fish Department

and it is presently being utilized by the residents of New Mexico and the general Southwest for recreational purposes such as fishing, picnicking and the like.

The New Mexico Game and Fish Department monthly stock Bill Evans Lake with trout and other fish and it is estimated that annually at least 17,000 fishermen and campers make use of the lake and surrounding areas for fishing, picnicking and other outdoor recreational activities.

In connection with the construction of its facility at Tyrone, New Mexico, Phelps Dodge Corporation also built 309 homes for its employees at a cost of approximately $7,750,000.00. Phelps Dodge Corporation in order to smelt the ore mined at Tyrone, New Mexico, constructed a smelter and townsite in the Playas Valley in Hidalgo County, New Mexico, at an additional cost of approximately $315,000,000.00. The facility in Tyrone, New Mexico, and the smelting facility in the Playas Valley in the State of New Mexico have a combined employment of 1,149 persons with a current monthly payroll of $1,797,720.00. The average size of the family, whose head is employed by Phelps Dodge Corporation, is four, therefore, the facilities at Tyrone, New Mexico, and Playas Valley directly support some 4,600 persons.

The location of the diversion dam from which Phelps Dodge Corporation obtains its water for use in its concentrator, is upstream from a portion of the Gila National Forest.

One of the questions which is presented to the Court, in this proceeding, is whether the Court should adopt

a proposition of law to the effect that the United States is entitled to minimum instream flow in the flowing streams within the confines of its national forests and thereby have the right to curtail upstream uses outside the forest boundaries which might affect the instream flow.

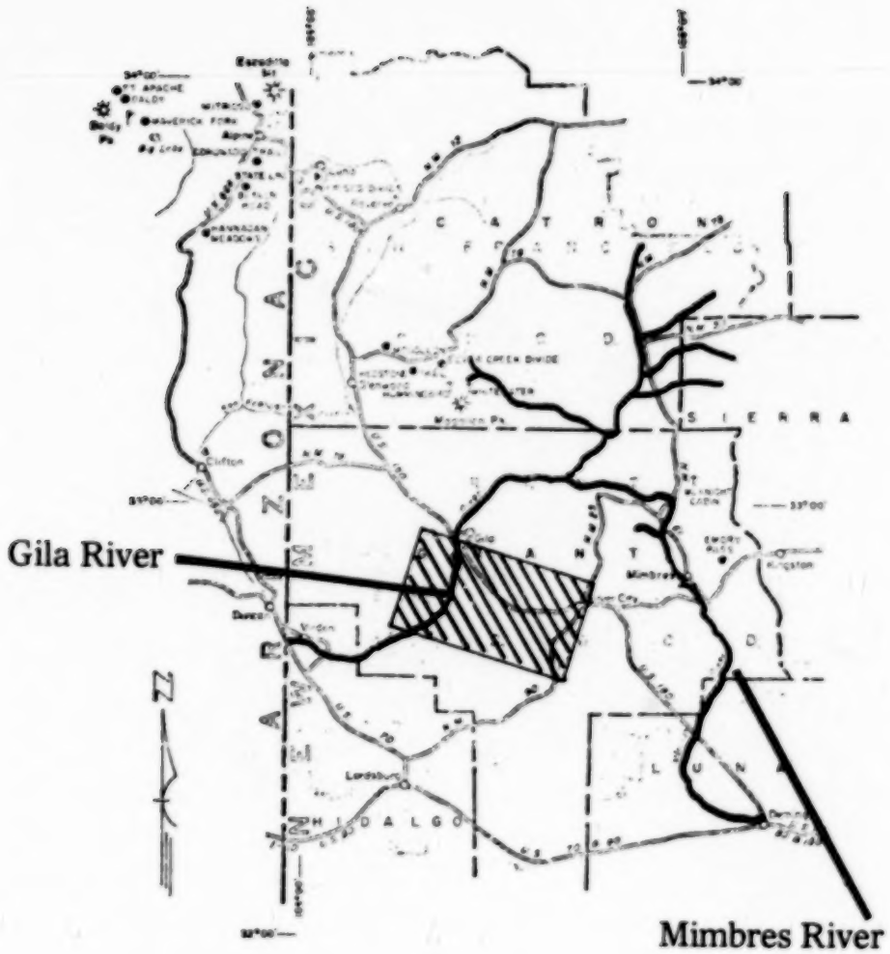
The Gila River stream system at this time is overappropriated. This area is subject to critical periods of water shortages and droughts. Inasmuch as the diversion dam of Phelps Dodge Corporation is located upstream from a portion of the Gila National Forest, if this Court adopts a rule of law guaranteeing the national forests within the United States minimum instream flow, then in times of water shortages and droughts in the Gila River stream system, it would be necessary for Phelps Dodge Corporation to curtail or cease diverting water from its diversion dam upstream from the Gila National Forest which would in turn result in a curtailment or in closing down the concentrator and mining operations in Tyrone, New Mexico, and the smelter in the Playas Valley. This would result, therefore, in a critical unemployment problem in Grant and Hidalgo Counties, and also Bill Evans Lake could no longer be maintained as a recreational facility.

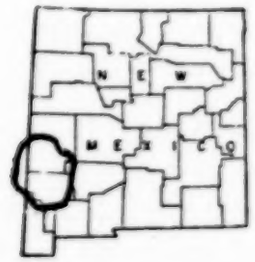
It is quite obvious if the United States is successful in obtaining guaranteed instream flow in the Mimbres water shed such ruling would most certainly apply to all of the flowing streams situate in the Gila National Forest including the Gila River stream system.

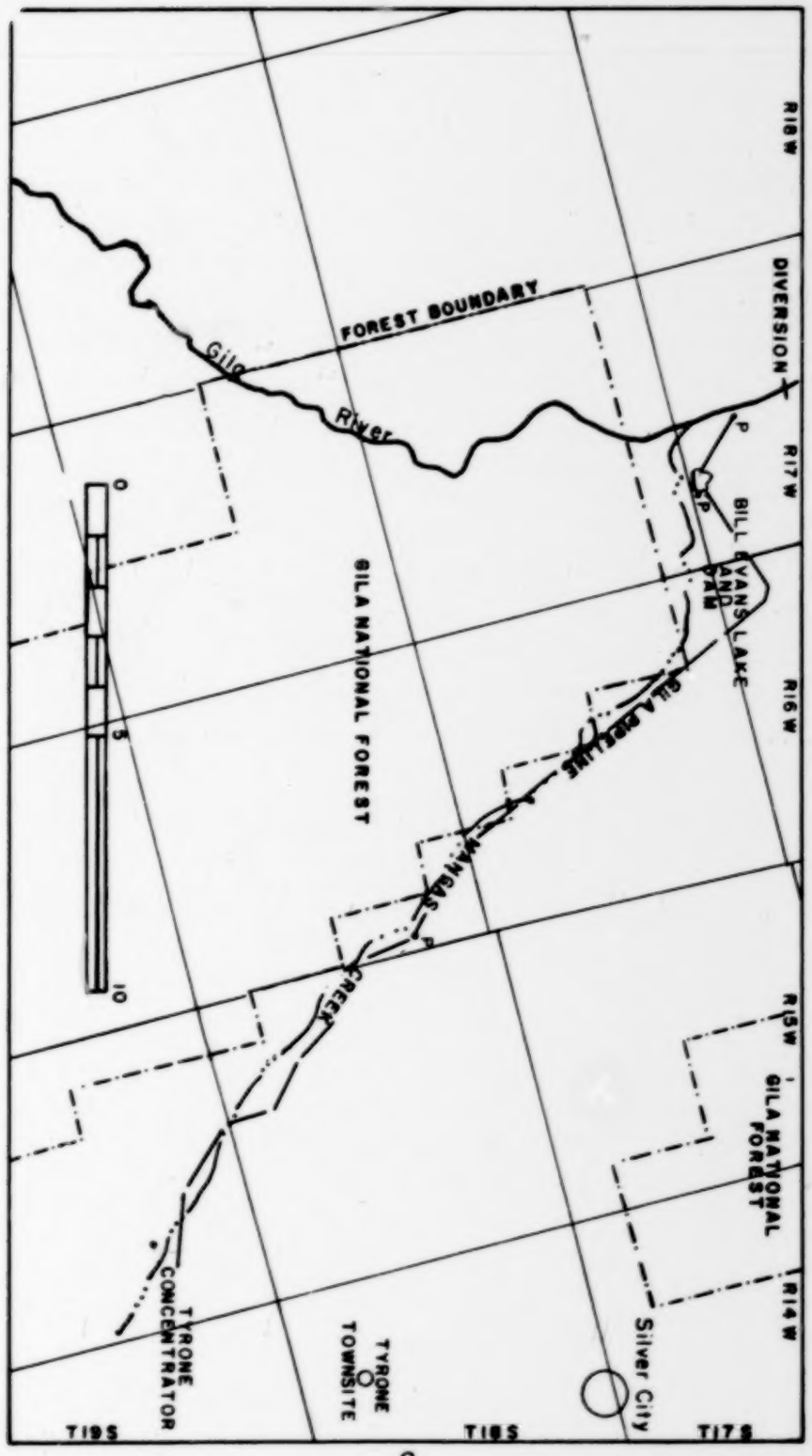
The following two pages contain two maps referred to as Map A and Map B.

Map A shows the general area of Southern New Mexico in order that the Court may orient itself as to the Mimbres River and the Gila River.

The shaded portion of Map A has been enlarged in Map B. Map B shows the location of the diversion works on the Gila River, Bill Evans Lake and the pipeline from Bill Evans Lake to the Tyrone concentrator. In addition, Map B shows the Gila National Forest boundary and the location of the Gila River flowing through forest lands.







ARGUMENT

THE UNITED STATES SHOULD BE BARRED FROM CLAIMING MINIMUM INSTREAM FLOW BASED ON THE DOCTRINE OF EQUITABLE ESTOPPEL.

In addition to the propositions of law advanced by the State of New Mexico in support its contention that the Supreme Court of the State of New Mexico should be affirmed, Phelps Dodge Corporation, in this brief, wishes to advance one additional proposition of law which it feels the Court should follow in affirming the decision of the Supreme Court of the State of New Mexico.

The Gila National Forest was established by presidential proclamation in 1899 and the portion of the Gila National Forest which is pertinent to the considerations of this brief were withdrawn by the United States by presidential proclamation February 6, 1907, and February 15, 1909.

The United States since the establishment of the Gila National Forest has taken no steps, nor made known its claims to instream flow until it was joined as a party defendant in the action in the District Court of the Sixth Judicial District of the State of New Mexico, Within and For the County of Luna, No. 6326, entitled "Mimbres Valley Irrigation Co. v. Tony Salopek, et al (A.16). The United States was joined as a party defendant in this action in 1970 (A.16). In its Answer to the Complaint in Intervention, no reference or claim to minimum instream flow was made (A.26). The first indication that the United States claimed minimum instream flow was in its Pre-trial Memorandum filed December 18, 1972 (A.41).

During the period from the establishment of that portion of the Gila National Forest affecting Phelps Dodge Corporation in 1907 and 1909, the United States has slept on its alleged rights to instream flow for the last sixty years.

It is clear that the United States' efforts to establish minimum instream flow, in this proceeding is an attempt on its part, not only to establish this right in the Mimbres water shed, but also in the entire Gila National Forest. The lands which furnish the drainage for the Gila River within the Gila National Forest are in a different water shed from the Mimbres water shed and are subject to the decision handed down by this Court in **Arizona v. California**, 373 U.S. 546, wherein the matters before this Court were not litigated. The decision in **Arizona v. California**, supra, of course, does not cover the Mimbres water shed, however, the application of the doctrine of instream flow sought by the United States would clearly cover the entire Gila National Forest including the Gila water shed.

The decision handed down in **Arizona v. California**, supra, recognizes the proposition of law that the United States had reserved sufficient water from the main stream of the Gila and San Francisco Rivers in quantities reasonably necessary to fulfill various forest purposes, and in recognizing this right, the Supreme Court held as follows:

". . .in addition to the diversions authorized herein the United States has the right to divert water from the mainstream of the Gila and San Francisco Rivers in quantities reasonably necessary to fulfill the purposes of the Gila National Forest with priority dates as of the date of withdrawal for forest purposes of each area of the forest with which the water is used," (underlining added) (376 U.S.340,350 11 L ed 2d 757, 764)

It is seen from the above language that no allusion whatever is made to minimum instream flow. The United States was a party to this action and failed to advance its claim for instream flow during the pendency of this action.

It goes without saying that the United States was aware or should have been aware of the development of water rights in the Gila Stream System subsequent to the withdrawal of the lands of the Gila National Forest. The United States knew or should have known that the development of water rights outside the forest boundaries might adversely affect the minimum instream flow of the Gila River flowing through the forest lands, however, the United States has failed for a period in excess of sixty years to make any claim to instream flow and should now be estopped from doing so.

If the Court will review the Statement of Interest it will note that Phelps Dodge Corporation expended in excess of $450,000,000.00 to construct its various facilities to mine and process copper ore.

A complete analysis of **Arizona v. California**, supra, in no way would apprise Phelps Dodge Corporation or any other person utilizing water from the Gila Stream System that the United States would at a future time claim minimum instream flow with a priority date of the withdrawal of the various lands from public domain.

Although the doctrine of equitable estoppel is not ordinarily applied to the actions of the United States, there is a substantial body of law holding that this doctrine can be applied in a given fact situation.

One of the cases in which the doctrine of equitable estoppel was applied against the United States is the case of **United States v. Georgia-Pacific Company**, 421 F.2d 92 (1970), where the United States Court of Appeals for the Ninth Circuit held as follows:

- - -

EQUITABLE ESTOPPEL

"1. Equitable estoppel is a doctrine adjusting the relative rights of parties based upon considera tion of justice and good conscience.

- - - (citations omitted)

Pomeroy has defined equitable estoppel as having the effect of absolutely precluding a party, both at law and equity

> '(f)rom asserting rights which might perhaps have otherwise existed, either of property, of contract, or of remedy as

> against another person, who has in good faith relied upon such conduct, and has been led thereby to change his position for the worse, and who on his part acquires some corresponding right, either of property, of contract, or of remedy.'

- - - (citations omitted)

2. Equitable estoppel is a rule of justice which, in its proper field, prevails over all other rules, City of Chetopa V. Board of County Com'rs., 156 Kan. 290, 133 P.2d 174, 177, (1943). An equitable estoppel will be found only where all the elements necessary for its invocation are shown to the court. The test in this circuit was reiterated in Hampton v. Paramount Pictures Corp., 279 F.2d 100, 104, 84 A.L.R. 2d 454 (9th Cir. 1960):

> "Four elements must be present to establish the defense of estoppel: (1) The party to be estopped must know the facts; (2) he must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended; (3) the latter must be ignorant of the true facts; and (4) he must rely on the former's conduct to his injury. California State Board of Equalization v. Coast Radio Products, 9 Cir., 228 F.2d 520, 525."

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3-5. Many kinds of activities — or inactivity — on the part of a defendant may permit the defense of equitable estoppel to be asserted against him. Obviously conduct amounting to fraud would suffice to raise an estoppel against a defendant, but it is clear that conduct far short of actual fraud will also suffice. A party's silence, for example, will work an estoppel if, under the circumstances, he has a duty to speak. A common example of this occurs when a plaintiff knowingly permits a defendant to make expenditures or improvements on property the latter believes to be his, but which in fact the plaintiff knows to be the plaintiff's property. In this case, equity may decree that the plaintiff is estopped from asserting title to the property in question. As the court in Management & Investment Co. v. Zmunt, 59 F.2d 663, 664 (6th Cir. 1932), said:

> "It is axiomatic that equity will not grant relief to one who has stood by and permitted the expenditure of large sums of money upon the faith and belief that he does not deem his rights to be violated."

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The Federal Courts in times of apparent injustice are leaning more and more to a doctrine of law which will

allow the United States to be estopped both in sovereign and proprietary capacities. In the case of **United States v. Lazy FC Ranch**, 481 F.2d 985 (1973), the Ninth Circuit Court of Appeals in applying the doctrine of equitable estoppel against the United States held as follows:

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> "1. We think the estoppel doctrine is applicable to the United States where justice and fair play require it. The supreme Court applied this rationale in Moser v. United States, 341 U.S. 41, 71 S. Ct. 553, 95 L.Ed. 729 (1951).
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> - - -
>
> This Court has also followed this rationale and permitted the estoppel defense against the government in causes where basic notions of fairness required us to do so. A leading example of the application of this principle is Shuster v. C.I.R., 312 F.2d 311 (9th Cir. 1962).
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> 2. The **Moser-Brandt-Schuster** line of cases establish the proposition that estoppel is available as a defense against the government if the government's wrongful conduct threatens to work a serious injustice and if the public's interest would not be unduly damaged by the imposition of estoppel. Gestuvo v. District Dir. of I.N.S., 337 F.Supp. 1093 (C.D. Cal. 1971). This proposition

is true even if the government is acting in a capacity that has traditionally been described as sovereign (as distinguished from proprietary) although we may be more reluctant to estop the government when it is acting in this capacity. **See Georgia-Pacific, supra**."

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In the case of the **United States v. Cappaert**, 508 F. 2d 313 (1974), the Ninth Circuit Court refused to apply the doctrine of equitable estoppel against the United States, however, in so doing, the Court was careful to state that its decision was based on the facts in that particular case. This case was later appealed to the Supreme Court of the United States, **Cappaert v. United States**, 426 U.S. 128, 48 L. Ed 2d 523, 96 S.Ct. 2062, which affirmed the lower Court's holding. The question of equitable stoppel was not argued before this Court.

In the case of **United States v. Wharton**, 514 F.2d 406 (1975), the United States Court of Appeals for the Ninth Circuit again applied the doctrine of equitable estoppel against the United States and in doing so held as follows:

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"6. Since **Georgia-Pacific** we have made it clear that estoppel may be applied against the government acting in its sovereign capacity. See United States v. Lazy FC Ranch, 481 F 2d 985 (9th Cir. 1973). And our decision in Standard Oil Co. v.

California, 107 F.2d 402, 416 (9th Cir. 1939), indicates recognition of the principle that estoppel can apply against the government even in disputes over public land, although in that case no sufficient showing of laches or estoppel was made.

This circuit's position on estoppel and its availability as a defense against the government was clearly expressed in United States v. Lazy FC Ranch, supra.

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In **Lazy FC Ranch** we noted that this Court had previously followed the **Moser** rationale and permitted estoppel to be used against the government where basic notions of fairness required it to do so, citing Schuster v. C.I.R., 312 F.2d 311 (9th Cir. 1962), and Brandt v. Hickel, 427 F.2d 53 (9th Cir. 1970).

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The test of estoppel applied in this circuit was outlined in Georgia-Pacific, 421 F.2d at 96:

(1) The party to be estopped must know the facts; (2) he must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended; (3) the latter must be ignorant of the true facts; and

(4) he must rely on the former's conduct to his injury."

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Applying the above principle of law to the facts in the instant cause, Phelps Dodge Corporation believes that all the grounds necessary for the application of the doctrine of estoppel are present.

Phelps Dodge Corporation, of course, does not concede that the United States is, in fact, entitled to guaranteed minimum instream flow under the reservation doctrine, however, if the Court should find the United States so entitled, still it should be barred at this late date from claiming this right.

The United States knew or should have known that it was entitled to minimum instream flow as of the date of the withdrawal of the forest lands from public domain, but by its failure to assert this right for a period of some sixty years, Phelps Dodge Corporation and other water appropriators in the Gila stream system were led to believe guaranteed minimum instream flow was not included in the water rights reserved by the United States.

Phelps Dodge Corporation was ignorant of the United States' claim for guaranteed minimum instream flow and could not have determined, prior to the erection of its ore processing facilities, that guaranteed minimum instream flow was, in fact, claimed by the United States. Relying on all information available to

it, concerning the water rights of the United States in the national forests, and on the conduct of the United States in not seeking additional definitions of its rights for a period of sixty years, Phelps Dodge Corporation, at great expense, constructed its ore processing facilities, the operation of which might, at this late date, be threatened by a requirement of guaranteed minimum instream flow within the national forests of the United States.

CONCLUSION

The Judgment of the New Mexico Supreme Court should be affirmed.

Respectfully submitted,

J. Wayne Woodbury,
Attorney

March, 1978